LIM HOCK BOON

v.

PP

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
TENGKU BAHARUDIN SHAH JCA
JAMES FOONG JCA
[CRIMINAL APPEAL NO: B-05-70-2004]
30 SEPTEMBER 2005

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in 950 grams cannabis - Appeal against conviction and death sentence - Whether learned judge relied upon inadmissible evidence to find mens rea of accused - Whether learned judge erred in handling of facts - Whether presumption under s. 37(da) applicable*

The appellant was convicted and sentenced to death for the offence of trafficking in dangerous drugs, *ie*, 950 grams cannabis under s. 39B of the Dangerous Drugs Act 1952 ('the Act'). He appealed against his conviction and sentence on the grounds that the learned judge relied upon inadmissible evidence to find *mens rea* on his part and that the learned judge erred in his handling of the facts. On the other hand, the prosecution's case was that the presumption under s. 37(da) of the Act was applicable since the appellant was found in actual possession of the drug in question. Also, since the amount of the drug recovered from the car exceeded the statutory trigger, the accused was a presumed trafficker.

Held (quashing conviction and setting aside sentence)

Per Gopal Sri Ram JCA:

(1) The appellant was under arrest when he made the statements in question and the learned judge rightfully held those statements to be inadmissible. However, there was a clear misdirection when he relied on those excluded statements to hold that the appellant had knowledge of the nature of the drug in question and was therefore in possession of it. Any findings made by a court must be based on legally admissible evidence. Otherwise there is no fair trial in accordance with the law. (para 9)

(2) The definition section in an Act of Parliament does not create an offence. It followed that the definition of trafficking in section 2 of the Act could not be prayed in aid at any stage of a case to impose criminal liability on an accused. The learned judge also appeared to have overlooked the effect of the case of *Chow Kok Keong v. PP*. That was a serious misdirection. Apart from that, it would run foul of the requirements of fundamental procedural fairness. Once the prosecution elects to rely on one of the statutory presumptions in s. 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of s. 2 of the Act (*PP v. Chia Leong Foo*). In the present case, the prosecution proceeded on the basis that it was relying on s. 37(da) of the Act. The accused also presented his case along the lines that the prosecution was relying purely on s. 37(da) of the Act. To resort to s. 2 of the Act at the end of the case, being quite ineffective as a matter of law, would be unfair and unjust to the accused. (paras 12, 15, 16 & 17)

(3) The learned judge erred in finding that the brother whom the accused claimed to have also used the car concerned was a fiction and that the accused's failure to call the brother and one other deprived the accused's testimony of weight. That was because the appeal record confirmed that the prosecution accepted the brother to be a real person and that the police with all their resources could not locate the brother. Therefore, it was unreasonable to expect the accused to produce him in court. It followed that there was no judicial appreciation of the evidence. Since the learned judge erred in his handling of the facts, that was sufficient reason to warrant appellate interference. (paras 18 & 19)

(4) Section 37(d) of the Act could not be prayed in aid to convict the accused of the lesser offence in light of the principle established by the cases in *Syed Ali Syed Abdul Hamid v. PP* and *PP v. Lin Lian Chen*. (para 23)

Bahasa Malaysia *translation of headnotes*

Perayu telah disabit dan dihukum atas kesalahan mengedar dadah berbahaya, iaitu 950 gram cannabis di bawah s. 39B Akta Dadah Berbahaya 1952 ('Akta'). Beliau merayu terhadap sabitan dan hukuman atas alasan bahawa yang arif hakim bergantung kepada

keterangan yang tidak boleh diterima-masuk dalam mendapati wujudnya *mens rea* serta silap dalam menangani fakta-fakta. Kes pendakwaan, sebaliknya, adalah bahawa anggapan di bawah s. 37(da) Akta terpakai kepada kes di sini oleh kerana perayu mempunyai milikan sebenar dadah berkenaan. Dihujahkan selanjutnya bahawa perayu adalah dianggap seorang pengedar disebabkan jumlah dadah yang dijumpai di dalam kereta melebihi had berat statutori.

Diputuskan (membatalkan sabitan dan mengenepikan hukuman)
Oleh Gopal Sri Ram HMR:

(1) Perayu berada di dalam tahanan semasa membuat kenyataan-kenyataan berkenaan dan yang arif hakim betul dalam mendapati kenyataan-kenyataan tersebut sebagai tidak boleh diterima-masuk. Bagaimanapun, terdapat salah arahan yang jelas bilamana beliau bergantung kepada kenyataan-kenyataan yang disingkir tersebut bagi mendapati bahawa perayu mempunyai pengetahuan tentang sifat dadah dan dengan itu mempunyai milikannya. Apa-apa dapatan yang dibuat oleh mahkamah harus berdasarkan kepada keterangan-keterangan yang boleh diterima-masuk menurut undang-undang. Jika tidak, suatu perbicaraan yang adil menurut undang-undang tidak mungkin dapat dicapai.

(2) Bahagian definasi di dalam suatu Akta Parlimen tidak boleh membentuk apa-apa kesalahan. Ianya mengikut bahawa definasi mengedar di bawah s. 2 Akta tidak boleh menjadi pergantungan di mana peringkat sekalipun bagi mengenakan liabiliti jenayah ke atas tertuduh. Yang arif hakim juga terlepas pandang akan kesan-kesan kes *Chow Kok Keong v. PP*. Itu merupakan satu salah arahan yang serius. Selain itu, ia bertentangan dengan kehendak asas keadilan prosedur. Sebaik sahaja pendakwaan memilih untuk bergantung kepada anggapan statutori di bawah s. 37 Akta, ia tidak boleh pada peringkat perbicaraan seterusnya memilih pula untuk bergantung kepada definasi s. 2 Akta yang sangat umum itu (*PP v. Chia Leong Foo*). Dalam kes semasa, pendakwaan mengemukakan kesnya atas dasar bahawa ia bergantung kepada s. 37(da) Akta. Begitu juga, pembelaan dikemukakan atas perkiraan bahawa pendakwaan bergantung kepada

A s. 37(da) Akta. Oleh yang demikian, adalah tidak adil kepada tertuduh jika pendakwaan dibenarkan untuk bergantung kepada s. 2 Akta di akhir kesnya, sementelah kesan pergantungan sedemikian di sisi undang-undang tidaklah seberapa mana.

B **(3)** Yang arif hakim khilaf dalam mendapati bahawa dakwaan tertuduh bahawa abang/atau adiknya juga ada menggunakan kereta tersebut adalah suatu fiksyen dan bahawa kegagalan tertuduh memanggil abang/atau adiknya serta seorang lain sebagai saksi menjadikan testimoni tertuduh tidak bernilai. Ini
C kerana rekod rayuan menunjukkan bahawa pendakwaan telah menerima bahawa abang/atau adik tertuduh tersebut sememangnya wujud, cumanya beliau gagal dikesan oleh pihak polis walaupun telah mencuba dengan segala kemampuan mereka. Oleh itu, adalah tidak munasabah untuk mengkehendaki
D tertuduh untuk mengemukakannya di mahkamah. Ianya mengikut bahawa keterangan-keterangan telah tidak dinilai dengan penuh kehakiman. Yang arif hakim khilaf dalam menangani fakta-fakta di sini sekaligus mewajarkan campurtangan di peringkat rayuan.

E **(4)** Seksyen 37(d) Akta tidak boleh menjadi alasan untuk mensabitkan tertuduh atas kesalahan lebih ringan mengambilkira prinsip yang tertera di dalam kes-kes *Syed Ali Syed Abdul Hamid v. PP* dan *PP v Lin Lian Chen*.

F **Case(s) referred to:**
Alcontara v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Gibb v. Federal Commissioner for Taxation [1966] 118 CLR 628 ***(refd)***
Mraz v. The Queen [1955] 93 CLR 493 ***(refd)***
G *Muhammed Hassan v. PP [1998] 2 CLJ 170 FC* ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
PMNT Ramasamy Chetty v. Syed Alsagoff 7 FMSLR 93 ***(refd)***
PP v. Badrulsham Baharom [1988] 2 MLJ 585 ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Kang Ho Soh [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 HC
H ***(refd)***
PP v. Lin Lian Chen [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Tam Tatt Eek [2005] 1 CLJ 713 CA ***(refd)***
Syed Ali Syed Abdul Hamid v. PP [1982] 1 MLJ 132 ***(refd)***
I *Tunde Apatira v. PP [2001] 1 CLJ 381 FC* ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (da), 39A, 39B

For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - Manoj Kurup; AG's Chambers

[Appeal from High Court, Shah Alam; No: 47-16-2000]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

[1] The appellant was convicted of an offence of trafficking under s. 39B of the Dangerous Drugs Act 1952 ("the Act") and sentenced to death. The facts of this case fall within a narrow compass.

[2] On 28 January 2000, at about 2am Chief Inspector William Kuyal (PW8) of the Narcotic Division at the Police Headquarters in Kelang together with a party of police personnel proceeded to a Shell petrol station at the 3rd milestone at Jalan Batu Tiga Lama, Kelang. There he and his party laid an ambush. About an hour later, a car drove into the petrol station. The car behaved suspiciously. It drove 3 or 4 times through and around the forecourt of the petrol station. There was only one person in the car. It was the appellant. He was the driver. PW8 observed all this. When the car came to a halt, he and the accompanying personnel approached it. The car's engine was still running. PW8 turned it off and took possession of the keys. He identified himself to the appellant as a police officer. He noticed that the appellant was sweating and appeared to be in a state of panic. According to PW8, the appellant made several statements. All of them were made before he was cautioned. The car was searched. The police found a packet which upon subsequent chemical examination was found to contain 950 grams of cannabis. The appellant was later charged and convicted as earlier observed.

[3] In this court the conviction was attacked on a number of grounds. But after careful consideration, only two points of importance emerge. First, that the learned judge used and relied upon inadmissible evidence to find mens rea on the part of the appellant. Second, that the learned judge erred in his handling of the facts. Before addressing these matters a few words must be said about the way in which the prosecution presented its case in the court below.

[4] This is the way in which the prosecution proceeded with its case throughout the trial. The appellant had been found in actual possession of the drug in question. The presumption under s. 37(da) of the Act therefore applied since the amount of the drug recovered from the car exceeded the statutory trigger, the accused was a presumed trafficker.

[5] Now, the possession referred to in s. 37(da) is not the same as the presumed possession which s. 37(d) refers. That was settled by the decision of the Federal Court in *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170. Attempts by the Public Prosecutor to have that ruling reversed failed in *Tunde Apatira v. Public Prosecutor* [2001] 1 CLJ 381 and more recently in *Public Prosecutor v. Tam Tatt Eek* [2005] 1 CLJ 713. It must be said at once in fairness to the learned judge that he was very much alive to his duty to make a positive finding that the appellant was found in actual possession of the proscribed drug. There are several passages in his judgment that make this quite clear.

[6] Actual possession within s. 37(da) has been accurately described by Lim Beng Choon J in *Public Prosecutor v. Badrulsham bin Baharom* [1988] 2 MLJ 585 as "*mens rea* possession". In that case, his lordship said:

> Then in *Saad bin Ibrahim v. Public Prosecutor* [1968] 1 MLJ 158 Yong J was quite emphatic as to the requirement of the element of knowledge on the part of the possessor before he could be criminally incriminated with possession of a prohibited article. Thus his Lordship said at p. 159:
>
> > In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. *The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea.* Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.
>
> The principle of possession with *mens rea* has been steadfastly adhered to by our courts in construing the word possession as used in section 37(d) of the Act. (emphasis added).

[7] How *mens rea* possession is to be proved depends on the facts and surrounding circumstances of each case. In the present instance, the learned judge relied on the appellant's statements made before being cautioned. And that really is the nub of the first point of importance in this case.

[8] The appellant's case is that he was already under arrest when he made the incriminating statements. Whether a person is under arrest is an issue of inferential fact. In other words it is a fact that is to be reasonably inferred from proved or admitted facts. No better passage than that from the judgment of Shankar J in *Public Prosecutor v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 is needed to bring home the point:

> With respect to the industry of counsel and the DPP I feel I ought to say something here about the system of judicial precedent. *That statements made by an accused person after his arrest are inadmissible, unless the statutory preconditions laid down by s. 37A of the Act are satisfied, is of course a matter of law.* But whether in a particular case a person was under actual arrest at a given moment in time is a question of fact, to be decided according to the circumstances of each case. It is well established that the reasons given by a judge for arriving at a conclusion of fact, is not to be treated as law and therefore citable. Failure to appreciate this can result in the court being crushed under the weight of its own reports. (See *Qualcast (Wolverhampton) Ltd v. Haynes Qualcast (Wolverhampton) Ltd v. Haynes* [1959] AC 743 at pp 757, 758, 759 and 761.)
>
> In the present case, the evidence makes it clear that on the basis of his information received, PW2 was prepared to back up with physical force, his order to the accused to stop and open the door with the direct objective that the boot of the car be opened for search. And he did so. Consequently I ruled that everything the accused said from the moment PW2 laid hands on him was inadmissible. In retrospect I would state it is my opinion that *since PW2 had already successfully ordered Kang to stop and open the car door, and since he had formed the intention to compel Kang to move to his orders from that point in time, it would be more correct to exclude everything the accused said from then on.*
>
> As to all the various authorities cited to me I am constrained to say that I regard each of them as being a decision on the facts of that particular case on the issue as to when a person is to be regarded as being under arrest for the purpose of s 37A of the Act. I have not found the distinction between 'constructive arrest'

> and 'legal arrest' helpful. It was contended by the learned DPP that in the present case Kang could only be regarded as being under arrest when PW2 so ordered after Kang allegedly admitted to the knowledge of the contents of the packages. With respect I do not agree that stopping a person to make enquiries, is the same as stopping a particular person on the basis of prior information received that that particular person has committed a particular offence. (emphasis added).

[9] So too here. It is clear from the evidence that the appellant was under arrest the moment PW8 turned off the engine and took possession of the keys. With his customary frankness the learned deputy conceded – and rightly – that the appellant was under arrest when he made the statements in question. That is why the learned judge held these statements to be inadmissible. Unfortunately, when he came to consider the issue of *mens rea* possession, he relied on these excluded statements to hold that the appellant had knowledge of the nature of the drug in question and was therefore in possession of it. This is clearly a misdirection. It is a cardinal principle of our criminal justice system that any findings that are made by a court must be based on legally admissible evidence. Otherwise there is absent a fair trial, that is to say, a trial conducted in accordance with law.

[10] As Fullagar J said in *Mraz v. The Queen* [1955] 93 CLR 493, 514:

> [E]very accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedures and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law.

[11] In his response to the appeal, the learned deputy argued that even if the appellant was not found in possession of the drug in question within s. 37(da) of the Act, his conviction could nevertheless be upheld on the alternative ground advanced by the learned judge. The alternative ground is that the accused was guilty of trafficking because his case came within one or more of the acts set out under the definition of the word "trafficking" in s. 2 of the Act. With respect, both principle and authority are against this argument.

[12] First the principle. It is settled law that a definition section in an Act of Parliament does not create an offence. The function of a definition section was described in the joint judgment of Barwick CJ, McTiernan and Taylor JJ in *Gibb v. Federal Commissioner for Taxation* [1966] 118 CLR 628, 635 as follows:

> The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. **Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way.** Consequently the effect of the Act and its operation in relation to dividends as defined by the Act must, we think, be found in the substantive provisions of the Act which deal with 'dividends'. (emphasis added).

[13] As for authority, reference need be made to only two cases. In *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64, Lord Diplock, after referring to the very wide definition of the expression "trafficking" in the Misuse of Drugs Act 1973 said:

> This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of sections 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

[14] In *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469, Edgar Joseph Jr SCJ said:

A And, as we have also noted, the Judge had relied on the Supreme Court case of *Teh Geok Hock v. Public Prosecutor* [1989] 3 MLJ 162, where the Court briefly considered the effect of the definition of trafficking aforesaid and, in particular the Court observed:

> B The definition of "trafficking" in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word "traffic" in the Singapore Misuse of Drugs Act. In the Singapore provision to "traffic" in a controlled drug so as to constitute an offence of trafficking C involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64.'

The Judge, however, appears to have overlooked the later Supreme Court case of *Cohen Lorraine Philis & Anor v. Public* D *Prosecutor* [1989] 3 MLJ 289, where the Court (per Abdul Hamid LP) held that in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be available even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s. 37(da) of the Act, but whether it E could succeed would depend upon the particular circumstances of each case. And, in the subsequent case of *Ng Chai Kem v. Public Prosecutor* [1994] 2 MLJ 210, the Supreme Court followed *Cohen.*

In our view, both *Cohen* and *Ng Chai Kem,* have severely watered down *Teh Geok Hock* in so far as it implies that passive F possession or self-administration can never be a defence to a charge of trafficking under s. 39B of our Act. Having considered this point afresh, we preferred the views expressed in *Cohen* and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as oversimplistic.

G **[15]** It is clear that *Chow Kok Keong* tolled the death knell of *Teh Geok Hock*. With it came to an end to the misconception that the definition of trafficking in s. 2 of the Act could be prayed in aid at any stage of a case to impose criminal liability on an accused. With respect, the learned judge in the instant case also appears H to have overlooked the effect of *Chow Kok Keong*. This is a serious misdirection.

[16] There is this further point. If the learned deputy's submission is accepted, it would run foul of the requirements of I fundamental procedural fairness. As Augustine Paul J said in *Public Prosecutor v. Chia Leong Foo* [2000] 4 CLJ 649:

Thus indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed. Arbitrary use of the presumption provisions, without any fixed guidelines, when there is direct evidence of the facts to be presumed may also prejudice the accused in another way. When the presumption provisions are invoked in one case and not in another although there is direct evidence of the facts to be presumed in both instances there may be a violation of art 8(1) of the Federal Constitution which guarantees equal protection of the law. It has been held that the guarantee of equal protection applies against substantive as well as procedural laws (see *Lachmandas v. State of Bombay* [1952] SCR 710; *State of WB v. Anwar Ali* [1952] SCR 284; *Kewal Singh v. Lajwanti* AIR 1980 SC 161; *Chandra Bhawan v. State of Mysore* [1969] II SCWR 750). From the standpoint of the latter it means that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence without discrimination (see *Shorter Constitution of India* by DG Basu (12th Ed) p 51). It follows that where there is direct evidence of a fact to be presumed the presumption cannot be invoked on the basis of a discretion. The rule must be applied equally to all cases that fall within the same class so that there is no discrimination in the manner of conducting the defence. That would amount to a reasonable classification for the purpose of art 8(1) of the Federal Constitution. I am therefore of the view that *the presumption provisions become inapplicable when there is evidence of the very fact to be presumed.* They must be invoked when there is no such evidence or when the available evidence is not safe or satisfactory to be relied upon. The mandatory nature of the presumption provisions must therefore be read in that light to mean that where there is evidence only of the basic facts the presumed facts must be deemed to exist unless the contrary is proved. I pause to add that it is the interest of the accused that compelled Rubin JC (as he then was) to say in *Public Prosecutor v. Okonkwo & Anor* [1993] 3 SLR 610 that *the intention of the prosecution to rely on a presumption must be intimated to the defence to enable the preparation of an appropriate line of cross-examination.* This may be done by the prosecution in its opening address. (emphasis added).

[17] The principle to be extracted from *Chia Leong Foo* is that once the prosecution elects to rely on one of the statutory presumptions in s. 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of s. 2 of the Act.

That is exactly the position here. Throughout its case, the prosecution proceeded on the basis that it was relying on s. 37(da). The accused also presented his case along the lines that the prosecution was relying purely on s. 37(da) of the Act. That much is clear from the appeal record. To resort to the wide and untrammelled definition in s. 2 of the Act at the end of the case, being quite ineffective as a matter of law, would be unfair and unjust to the accused.

[18] Now the complaint that the learned judge erred in his handling of the facts. As already adverted to, the prosecution's case was that the accused knew that the drug was in the car, that his purpose was to pass it on to some other person and that he was therefore trafficking in the drug. The defence case was very different so far as knowledge of the drug was concerned. The appellant's story was that he did not have exclusive use of the car in question. He said that the car was used by his brother Lim Hock Kee and one Ah Ba. The case that was being advanced was that it was not the appellant who placed the offending drug in the car. As for the brother, the police were unable to locate him.

[19] Against this background, this is the way in which the learned judge handled the facts. He rejected the defence for several reasons. But the more important reasons were these. First, that Hock Kee was a fiction. And second that the accused's failure to call Hock Kee and Ah Ba deprived the accused's testimony of weight. With respect this approach to the defence case amounts to an error. The appeal record confirms that the prosecution accepted Hock Kee to be a real person. That in itself was sufficient reason for the learned judge to so hold. Further, if the police, with all their resources, could not locate either Hock Kee, it was not reasonable to expect the accused to produce him. Thus, there was no judicial appreciation of the evidence. In short, the learned judge erred in his handling of the facts. And this is sufficient reason to warrant appellate interference. See, *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469; *Alcontara v. Public Prosecutor* [1996] 1 CLJ 705.

[20] In the course of argument there was a suggestion by the prosecution and counsel for the appellant that the appellant might, on the facts, be convicted for the offence of possession under s. 39A read with s. 12(2) of the Act because of the presumption of possession under s. 37(d) of the Act. This suggestion runs in the teeth of high authority.

[21] In *Syed Ali bin Syed Abdul Hamid v. Public Prosecutor* [1982] 1 MLJ 132, the car driven by the first accused was stopped by Customs officers. The second accused was seated in the front passenger seat. There were two women and children in the back seat. Raw opium was found hidden behind the back rest of the rear seat of the car. The second accused had borrowed the car from the owner and had been using it from 13 August 1977 to 15 August 1977, when the car was stopped and searched. The first accused merely drove the car because he was asked to do so. Both accused were convicted for trafficking in dangerous drugs. They appealed. Salleh Abas FJ when delivering the judgment of an unusually strong Federal Court (Raja Azlan Shah CJ (Malaya), Salleh Abas and Abdul Hamid FJJ) said that the presumption in s. 37(d) had no application:

> because the car in which the opium was found cannot be held to be 'anything whatsoever' within the meaning of paragraph (d). This expression 'anything whatsoever' may appear to have a wide import, but its scope and extent is limited by the word 'containing' which qualifies it. A car cannot be said to contain drugs nor could it be said to be a container of drugs although opium was found in it. To hold that the car contains drugs would be, in our view, to twist and overstretch the language beyond its common usage. Thomson J, as he then was, in *Tong Peng Hong v. Public Prosecutor* [1955] MLJ 232 made a thorough analysis of the scope and application of the presumption under paragraph (d). It is sufficient for us here to refer to that part of the judgment where he said: "Both by derivation and by ordinary usage the word 'containing' implies some measure of holding or restriction" or, if we may add, some measure of confinement. That being the case the presumption under paragraph (d) is irrelevant.

[22] The Supreme Court in *Public Prosecutor v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285, though not referring to *Syed Ali bin Syed Abdul Hamid v. Public Prosecutor* came to the same conclusion. In that case, Edgar Joseph Jr FCJ said:

> Before us, as regards the second ground upon which the trial judge based his order of acquittal and discharge, it was argued by the learned deputy public prosecutor, in effect, that because the respondent was, at the material time, the sole occupant of the Honda, which although not owned by him, was in his custody or under his control, consequently, the seven newspaper packages which contained the drugs recovered from the Honda, although

A not recovered from a specially constructed compartment therein, were, *ipso facto*, or in other words, as a matter of law, also in his custody or control, and therefore there was a case for the respondent to answer, regard being had to the provision of s. 37(d) of the Act which says:

B

> any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the

C nature of such drug.

With respect, we considered that that submission went too far and was clearly wrong for reasons we shall state.

In the first place, we would respectfully agree with the proposition

D of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v. Public Prosecutor* [1955] MLJ 232 that a vehicle in which a drug is carried does not ipso facto fall within the words 'anything whatsoever containing any dangerous drug' and therefore in such a case, the presumption contained in s. 37(d) does not arise.

E

[23] Applying the principle established by these cases, it is clear that s. 37(d) may not be prayed in aid to convict the accused of the lesser offence. That counsel for the appellant said, as matter of last resort, that s. 37(d) may apply, it is sufficient to recall to

F mind the following remark of Thorne J in *PMNT Ramasamy Chetty v. Syed Alsagoff* 7 FMSLR 93 at p 120:

> [T]his court should disregard the admission [of counsel] on the grounds that it was an erroneous statement of law no more binding or authoritative than many other bizarre propositions of

G law to which courts have to listen.

[24] For the reasons already given, the conviction of the appellant is unsafe and this court has no alternative but to quash it and set aside the sentence imposed.

H

[25] My learned brother James Foong Cheng Yuen, JCA has seen this judgment in draft and has expressed his agreement with it.

I